



EMPLOYMENT TRIBUNALS

Claimant: Ms J Nyarega

Respondent: Anchor Hanover Group

Heard by CVP

On: 29 April 2022

Before: Employment Judge Corrigan
(Sitting Alone)

Representation

Claimant: Mr R Robinson, FRU representative

Respondent: Ms R Swords-Kieley, Counsel

RESERVED JUDGMENT

1. The claimant's complaints are out of time and the tribunal does not have jurisdiction to hear them. The complaints are dismissed.

REASONS

1. This matter was listed for a preliminary hearing to consider the issues of time limits as follows:
2. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5 March 2020 may not have been brought in time.
3. Were the race discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - 3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

- 3.2 If not, was there conduct extending over a period?
- 3.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- 3.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
- 3.4.1 Why were the complaints not made to the Tribunal in time?
 - 3.4.2 In any event, is it just and equitable in all the circumstances to extend time?

4. Was the unauthorised deductions /failure to pay holiday pay claim made within the time limit in the Employment Rights Act 1996? The Tribunal will decide:
- 4.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
 - 4.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
 - 4.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
 - 4.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Hearing

- 5. I heard evidence from the claimant and also had a bundle of documents relating to this issue. Both parties' representatives made oral submissions and written submissions.
- 6. Based on the evidence heard and the documents before me I found the following facts.

Facts

- 7. The claimant's employment ended on 21 January 2020 giving a deadline of 20 April 2020 (counting from the dismissal) and the claimant did not contact ACAS until 4 June 2020. The conciliation ended on 10 June 2020 and the claim was submitted on 12 June 2020.
- 8. The claimant was invited to a disciplinary hearing on 21 January 2020 to address the charge that on 2 October 2019 she was found asleep multiple times on shift and that she had breached trust and confidence

- by falsifying sickness absence and failing to attend a scheduled shift. The meeting was chaired by the Home Manager.
9. The case had been investigated by another manager (the investigating manager) who recommended the case go to disciplinary hearing.
 10. Allegation 1 was found to be proven based on information from two colleagues who had had to wake the claimant and had had to attend to a customer alarm as the claimant had been asleep. The respondent's case is the staff members concerned sent the allegations from their own email accounts (pp115-117).
 11. Allegation 2 was found proven as the claimant had reported ill with diarrhea and vomiting but still attended a shift later the same day at another home. The claimant's account had not been substantiated by the relevant home manager. The claimant was dismissed the same day and received her final pay on 26 February 2020. That was the date when any outstanding holiday should have been paid, giving a deadline of 25 May 2020 for bringing that claim to the tribunal.
 12. At that time the claimant had been suffering with an ongoing gynecological condition as she had been whilst working for the respondent. However, this did not prevent her writing her appeal which she submitted on 6 February 2020.
 13. In February she received the news that her father, sister and nephew had all been killed in a car crash in Kenya. There are some inconsistencies around when she found out about this, but I accept she was bereaved. She travelled to Kenya on 8 March 2020 (having booked the ticket on 7 February 2020) and returned on 26 March 2020. Whilst away she was contacted and told she had stage 2 cancer connected to the gynecological condition. Nevertheless, that condition did not prevent her travelling or addressing her appeal on her return.
 14. She contacted the respondent on 27 March 2020 to say she was back from Kenya and chasing her appeal. The claimant then contracted Covid severely enough to be admitted to hospital for 3 days between 22-25 April 2020 and this delayed the cancer treatment.
 15. She chased the appeal again on 4 May 2020. The appeal was heard on 22 May 2020 and 27 May 2020 by skype.
 16. Due to lockdown the claimant was unable to attend the CAB and she said the phone was ringing and no one answered.
 17. The claimant said she did not know about the time limit and believed she should complete the internal appeal first.
 18. The claim was submitted on 12 June 2020. There were no particulars, but the claims were race discrimination and unpaid holiday pay.

19. The appeal upheld the decision on 18 June 2020.
20. The claimant then provided a document entitled race discrimination statement on 20 November 2020. That listed a number of allegations of race discrimination.
21. The respondent distinguishes between two types of claim in that statement. Firstly, the claimant's complaints about her treatment by the Deputy Home Manager. The last such allegation was October 2019. Secondly, his involvement in the dismissal, which also ceased in October 2019. He was neither responsible for the investigation or the decision to dismiss.
22. The claimant's representative conceded the above point despite the claimant saying in evidence that the dismissal manager spoke to the Deputy Home Manager during the dismissal hearing before making the decision. She says he influenced the decision, though she does not know what was said in the call. The highest she puts this allegation is that he was motivated by race, not the dismissal officer.
23. The first time she received legal advice was when she met her FRU rep on 31 March 2022.
24. Both the Deputy Home Manager and the Investigating Manager have left the respondent, in September 2021 and January 2020 respectively.
25. The respondent referred me to the case of *Reynolds and ors v CLFIS (UK) Ltd 2015 ICR 1010* as authority that it is not correct in principle to adopt a composite approach and combine the discriminatory motivation of one employee with the action of another employee. The individual who does the act eg dismisses the employee must themselves be motivated by the protected characteristic for it to be an act of direct discrimination.

Conclusions

26. I accept the respondent's argument that the last allegation of discriminatory conduct is October 2019. The claimant's case is that it was the Deputy Home Manager that was motivated by her protected characteristic and not the investigating manager or the dismissing manager. His last involvement was October 2019.
27. With respect to the late addition of the allegation that he spoke with the dismissing manager on the day of the dismissal this evidence was added late, and the claimant does not in fact have any information about what was said in that call on which to base an allegation of discrimination.

28. With respect to the allegations that are distinct from the dismissal process I agree with the respondent that these are separate and are well out of time. No real reason has been given for the delay in respect of those claims save that the claimant has waited until her employment ended to bring any claim. The relevant witness has left the respondent and I do not find it just and equitable to extend time.
29. With respect to the involvement in the dismissal ending in October 2019, I do not consider this fatal to extending time, just one factor. Although it means the delay is longer, it is also understandable that a litigant in person would consider that the deadline would not run and the dismissal process not be complete until the end of that process, nor indeed the appeal.
30. I am also persuaded that the claimant had multiple adverse events going on in the period between her dismissal and the submission of her claim including the bereavement, her own health issues and the pandemic. This included herself suffering from COVID so severely that she was admitted to hospital two days after the deadline, counting from the dismissal date. She said, and I accept, that she had had severe symptoms for a week before that.
31. She put the claim in before the appeal process finally completed with the decision being sent on 18 June 2020. So, at the time she put the claim in the matters were still being actively considered by the respondent.
32. If these were the only factors for me to consider I would consider extending time. However, I also have to consider the merits of the case and prejudice to the respondent.
33. Considering the merits of the discriminatory dismissal claim I consider that claim to have little reasonable prospects of success given that the source of the evidence against the claimant that she was sleeping on duty were her colleagues, not the Deputy Home Manager, and it was also the manager of the other home where she worked who did not corroborate the claimant's account in respect of falsifying sickness absence and failing to attend her shift. Those matters are considered to be gross misconduct by the respondent.
34. I also note that two of the managers involved have now left the respondent including the manager who is accused of being the perpetrator of the race discrimination. This does prejudice the respondent's ability to contest the claim, beyond the usual prejudice of losing the protection of the limitation period.
35. In those circumstances, though finely balanced, I consider the balance tips against extending time.

36. It follows that the race discrimination is out of time and the tribunal does not have jurisdiction to hear it.
37. Turning to the unpaid holiday claim. The deadline for this claim was 25 May 2020. The claimant contacted ACAS on 4 June and submitted her claim on 12 June 2020. I have to consider whether it was reasonably practicable to put her claim in on time. This claim was not being considered in the internal appeal. The date of the payment was 26 February 2020. I note that this was around the time of the bereavement and just before her trip to Kenya. I also note that she had her own health issues after her return, although she was still able to attend the appeal. She was able to try to reach the CAB by phone. All that was required to start the process was to phone ACAS by 25 May 2020. The likelihood is that she did not consider this claim separate to the other claim for which she was completing the internal process. Whilst I have some sympathy for the claimant given she disputes that she has taken the leave claimed by the respondent I find that it was reasonably practicable for her to submit that claim by contacting ACAS prior to the 25 May 2020 and that the tribunal therefore does not have jurisdiction to hear that claim.

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Employment Judge Corrigan
20 July 2022

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